

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL AT KAMPALA

Coram: Owiny -Dollo DCJ, Egonda-Ntende, Tuhaise, JJA.

CIVIL APPLICATION NO 345 OF 2018

(Arising from Civil Application No. 2005 of 2014 and High Court Civil Suit No. 91 of 2018)

BETWEEN

EMMANUEL KATO..... PETITIONER

AND

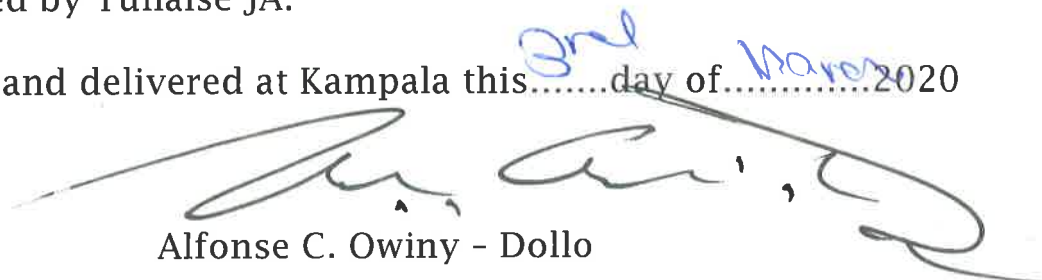
MUYANJA MBABALI..... RESPONDENT

RULING OF OWINY - DOLLO; DCJ

I have had the benefit of reading the ruling of my learned sister, Tuhaise, JA in draft and I agree with it. I have nothing useful to add.

Since Egonda - Ntende JA also agrees, orders are hereby given in the terms proposed by Tuhaise JA.

Dated, signed and delivered at Kampala this.....day of.....2020



Alfonse C. Owiny - Dollo
Deputy Chief Justice

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Owiny-Dollo, DCJ, Egonda-Ntende & Tuhaise, JJA*]

CIVIL APPLICATION NO. 345 of 2018

(Arising from Civil Application No. 2005 of 2014 and High Court Civil Suit
No. 91 of 2018)

BETWEEN

Emmanuel Kato=====Applicant

AND

Muyanja Mbabali=====Respondent

Ruling of Fredrick Egonda-Ntende, JA

- [1] I have had the opportunity of reading in draft the ruling of my sister, Tuhaise, JA. I agree with it and having nothing useful to add.
- [2] I agree with the orders she proposes.

Dated, signed and delivered at Kampala this 3rd day of March 2020


Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Alfonse Owiny-Dollo DCJ, Egonda-Ntende & Tuhaise, JJA

Civil Application No. 345 of 2018

Arising from Civil Application No. 2005 of 2014

All arising from High Court Civil Suit No. 91 of 2018

Emmanuel Kato:.....Applicant

Versus

Muyanja Mbabali:.....Respondent

Ruling of Percy Night Tuhaise, JA

This application was brought under section 12 of the Judicature Act and rules 2 (2), 6(2) (b), & 44(1) Judicature (Court of Appeal) Rules 13 – 10. It seeks orders that:-

1. The execution of the orders in High Court Civil Suit No. 91 of 2008 be stayed pending the determination of the appeal to the Court of Appeal.
2. Costs of and incidental to this application abide the result of the appeal.

The grounds of the application were that:-

1. The applicant was the defendant and judgment debtor in Civil Suit No. 91 of 2008.
2. The applicant was aggrieved by said decision and he filed Civil Appeal No. 181 of 2014 in the Court of Appeal.
3. The applicant applied for a stay of execution vide High Court Execution Division MA No. 2005 of 2014 and was ordered to deposit security of US\$ 73,330 within 45 days from 28th September, 2018.

4. The conditional stay granted by the High Court is harsh and does not meet the ends of justice.
5. It is therefore in the interest of justice to stay execution of the decree on more reasonable terms so that the appeal is not rendered nugatory.
6. The appeal has a high probability of success.

The application was supported by two affidavits of Mr. James Katono, an Advocate of the applicant's Firm who averred that he was authorized to swear them.

The affidavit evidence, as deduced from the said affidavits, which in a way also highlight the background of the case, is that the respondent filed Civil Suit No. 91 of 2008 for recovery of the outstanding balance of a loan allegedly due from the applicant. On 4th July, 2014, judgement was delivered in favour of the respondent for United States Dollars (US\$) 220,000 (two hundred and twenty thousand) with interest at 11% per annum from the date of judgement till payment in full, and costs of the suit. The respondent applied for a warrant of arrest in execution *vide* EMA No. 1952 of 2014, attached as annexure C to James Katono's supplementary affidavit.

The applicant appealed against the High Court decision *vide* Civil Appeal No. 181 of 2014, and attached a copy of the memorandum and record of appeal to the affidavit of James Katono marked A. He also applied for a stay of execution in the High Court *vide* Miscellaneous Application No. 2005 of 2014. On 28th September, 2018, the application for stay of execution was granted on condition that the applicant deposits in court security of 1/3 of the decretal amount which totals to US\$ 73,330 (seventy three thousand, three hundred thirty) within 45 days, and costs.

The applicant considered the said conditions to be extremely harsh. He filed the instant application on 30th October 2018. It is averred in the supporting



affidavits that the applicant will suffer substantial loss if the decree is executed; that depositing the above colossal amount of money does not in any way add any value, as it does not attract any interest for the benefit of any of the parties, yet it would affect the applicant's business cash flows; that the applicant has a permanent place of abode in Kampala and will pay the decretal sum if the appeal is lost; that if execution proceeds, the appeal will be rendered nugatory; that the respondent had applied for a warrant of arrest in execution *vide* EMA No 1952 of 2014; that if this application is not granted the applicant stands to be arrested in execution, for failure to deposit the said colossal amount.

Representation

At the hearing of this application the applicant was represented by David Nambale, learned Counsel, from M/S Nambale, Nerima and Company Advocates.

The respondent was duly served but did not appear on the hearing date. The hearing proceeded in absence of the respondent after Court was satisfied that the respondent was effectively served.

Submissions for the Applicant

Counsel for the applicant submitted that the judgment debtor was threatening to execute the orders of the High Court in Civil Suit No. 91/2008 and the application to execute by way of arrest of the judgment debtor was attached to the supporting affidavits. He submitted that a stay of execution was granted by the High Court but it abated because it was on condition that the decretal sum should be deposited within 45 days, which was the essence of the applicant's grievance.

On the question of the option to appeal the High Court's order of stay of execution issued earlier, Counsel submitted that he was not too sure it was immediately available because it would require him to seek leave to appeal; that

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since the time frames involved in the appeal process require the record of proceedings which have to be typed out, that meanwhile the clock is ticking. He also submitted that he believes the option to appeal was available, and so was the option to file a fresh application to this Court, invoking its inherent jurisdiction; and that he opted to exercise the latter option.

He informed this Court that he filed the instant application in this Court because the conditions given by the High Court were harsh, requiring the applicant to deposit a colossal sum of money difficult to raise in such a short time, but secondly, that it does the judgment creditor no benefit for money to be drawn, borrowed perhaps, that such money sits in the registrar's office for another set of years not accruing any interest. He submitted that this is a proper case to dispense with the harsh condition and grant the applicant a stay of execution with further consequential orders, and to fix the appeal expeditiously for hearing. He contended that the order of stay of execution issued by the High Court does not exist anymore.

Counsel further submitted that there is no opposing affidavit or affidavit in reply filed by the respondent, that it is trite law that when there is no such affidavit the application stands unchallenged.

Counsel informed this Court that the instant application was filed a while ago but it was a challenge securing a date. He also informed this Court that there is an appeal against the order of Justice Adonyo in HCCS No. 91/2008 filed in this Court on 31st October 2014, which appeal is annexed to the affidavit of James Katono; that through no fault of the applicant the appeal is yet to be fixed for hearing, but the judgment creditor has sought to execute the decree by way of arrest and detention of the applicant in a civil prison. He submitted that this is going to cause irreparable damage to the applicant; that while arrest and detention is a lawful mechanism of execution, the scar and the stigma associated with press coverage is the kind that one can never repair.

He submitted that the appeal has a very high likelihood of success because the applicant was decreed to pay money allegedly borrowed without any evidence or loan agreement; that he was held liable for a cheque issued by a company in which he is a director or a disclosed principal; that the decree is attached to the supplementary affidavit of James Katono filed in this Court on the 19th of February marked annexure A. He conceded that he did not attach the judgment appealed against. He prayed that the appeal be fixed urgently, and that a stay of execution pending appeal be issued by this Court.

Resolution of the Application

The hearing of this application proceeded in absence of the respondent (*ex parte*), under rule 56 (2) of the Judicature (Court of Appeal Rules SI 13 – 10, because Court was satisfied that the respondent was served through his counsel as averred in the affidavit of service of this Court's process server. However, whether a matter proceeds *ex parte* or not, the burden on the applicant to prove his/her case to the required standards remains.

I have considered the grounds of the application, the affidavit evidence and submissions of Counsel, as well as the law applicable to this situation.

The evidence on record shows that the applicant, instead of appealing against the order of stay of execution he considered to be harsh, filed the instant application. Annexure C to the supplementary affidavit of James Katono also shows that the respondent applied for a warrant of arrest in execution vide EMA No. 1952 of 2014. Annexure C was signed by the plaintiff's counsel on 23rd July 2014 but does not indicate the date when it was filed in the High Court. Nonetheless the adduced evidence on record shows the warrant of arrest in execution was issued on 5th February, 2019.

The applicant's counsel, in his submissions, alluded to the fact that the High Court's conditional order of stay of execution had lapsed or was no longer in

existence. The evidence on record shows that the High Court issued the conditional order of stay of execution on 28th September 2018. The condition in the order of stay of execution was that the applicant deposits in court security of US\$ 73,330 (seventy three thousand, three hundred thirty) within forty five (45) days from the date of the ruling. Clause 2 of the order stated that in the event of default by the applicant to pay the security within the stipulated time, the order of stay of execution shall automatically lapse and the respondent shall be at liberty to continue the execution proceedings to enforce the decree.

The evidence on record also shows that the applicant filed the instant application on 30th October 2018. This was before the forty five (45) days set out in the High Court order of stay expired. Thus, the instant application was filed before the order issued by the High Court lapsed or abated. Even if he had filed the application after the order lapsed, the fact that he ignored to fulfil its condition would remain. There is no evidence on record that the applicant had appealed against, or sought review of, the order.

It is now settled law that a court order once issued must be obeyed unless it has been appealed or reviewed. I would reiterate the position of this Court in **Amrit Goyal V Harichand Goyal and 3 Others Civil Application No. 109/2004** that:-

“A court order is a court order. It must be obeyed as ordered unless set aside or varied. It is not a mere technicality that can be ignored. If we allowed court orders to be ignored with impunity, this would destroy the authority of judicial orders which is the heart of all judicial systems.”

In the instant application the applicant's depositing in court security of US\$ 73,330 within forty five (45) days from the date of the ruling was a condition precedent to the order of stay being in force. It had to be obeyed by the applicant. Instead he chose to ignore it and file another similar application in

this Court, before it even abated. If the applicant was aggrieved by what he calls harsh conditions in the order of stay of execution issued by the High Court, he should have appealed against it in this Court or sought a review of the same by the court which issued it. I would consider it a serious abuse of court process.

I have also noted the applicant's arguments that the appeal has high chances of success. The more realistic and appropriate test, in my considered opinion, would be that the appeal raises serious triable issues for determination, rather than that there are high chances, or likelihood of success, for it is unlikely that a party can determine as a fact that a case will succeed. Secondly, without prejudice, I note that the same applicant, who bases his claims on the factor of high chances of success of his appeal, did not, as he did concede in his submissions, bother to attach a copy of the judgment in HCCS No. 91/2008 to the supporting affidavits to enable this court determine the said factor.

This Court has inherent powers to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, among other things. I find the applicant's ignoring a court order, and his choosing to file a similar application in another court instead of appealing or seeking a review against the order, to be an abuse of court process. I would accordingly dismiss it. I would make no order as to costs since the respondent did not file an affidavit in reply or attend court.

Dated at Kampala this 3rd day of March 2020

Percy Night Tuhaise

Percy Night Tuhaise, JA

